S SUHERMAN SUHARNOH v. PP

HIGH COURT SABAH & SARAWAK, LABUAN
WONG SIONG TUNG J
[CRIMINAL APPEAL NO: LBN-42-1-2-2020]
8 MARCH 2022

Abstract – *A witness could not be worthy of one aspect of a case but unworthy in the other aspect of the same case. In the present case, the decision of the Sessions Court Judge ('SJ') to convict and sentence the appellant was derived from the SJ's findings of only accepting the complainant's allegations regarding the appellant's acts of hugging and kissing the complainant but rejected the complainant's allegations pertaining to the appellant's acts of sexually penetrating the complainant even though the two acts were inextricably linked and the initial acts led to the former acts.*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Appellant originally charged for statutory rape against minor – Sessions Court Judge ('SJ') amended original charge into charge of sexual assault on minor under s. 14(a) of Sexual Offences Against Children Act 2017 after evaluating evidence by minor – Appellant convicted and sentenced under amended charge – Whether SJ given due consideration to all evidence and contradictions before arriving at decision – Whether SJ could accept one aspect of case as true while other aspect as untrue*

At the Sessions Court, the appellant was charged with the offence of statutory rape ('original charge') of the complainant, a minor ('PW7'). According to PW7, the incident occurred at the time PW7 and the appellant were together in the appellant's room, at the appellant's family house. There, the appellant had not only kissed PW7 on her lips and uplifted her skirt, but also laid on top of her before he proceeded to insert his penis into her genitalia. It was also alleged by PW7 that, among others: (i) the appellant had hugged and kissed PW7 before she was raped by the same thrice; (ii) the appellant had ejaculated inside PW7 and the colour of the appellant's semen was white; (iii) PW7 could feel the pain of her genitalia being penetrated by the appellant's penis; (iv) PW7 had experienced monthly period; and (v) other than the appellant, PW7 had also been raped by another man called 'Pakcik Farid' at another date and venue. Nevertheless, PW7's evidence contradicted with the evidence of PW1, the doctor who had conducted medical examination on PW7's genitalia after the incident. In PW1's evidence, it was posited that: (i) PW7's hymen was intact; (ii) PW7's urethral meatus, clitoris and posterior fourchette were normal; and (iii) PW7's menstrual function had not even begun. In other words, PW1 was suggesting that it was not probable that PW7 had been raped by the appellant or Pakcik Farid. However, after the evidence was evaluated by the Sessions Court Judge

A ('SJ'), the SJ decided to only accept the evidence by PW7 regarding the appellant had hugged and kissed her on the lips, before amending the original charge into a charge of sexual physical assault on a child under s. 14(a) of the Sexual Offences Against Children Act 2017, for kissing PW7 on the lips ('amended charge'). In respect of the amended charge the appellant was found
B guilty and sentenced to imprisonment for four years and one stroke of whipping. The appellant was also ordered to pay PW7, as compensation, a sum of RM8,000, in default, five months imprisonment. Aggrieved by SJ's decision, the appellant filed the present appeal against the conviction and sentence. The main issue that arose in the present appeal was whether the SJ
C had failed to take into consideration the contradictions between PW7's and PW1's evidence in arriving at his decision.

Held (allowing appeal; setting aside Sessions Court's conviction and sentence):

D **(1)** Due to the contradictions between the evidence of PW1 and PW7, of the intact hymen of PW7 and the sexual penetration by the appellant and Pakcik Farid, the credibility of PW7's allegations had been destroyed. However, no evidence had ever been adduced to explain such serious contradictions. Therefore, PW7's allegations that she had been sexually penetrated by the appellant or Pakcik Farid, in light of PW1's evidence,
E could not be true. (paras 22, 27 & 28)

(2) The alleged acts of hugging, kissing and rape or sexual penetration by the appellant were inextricably intertwined. This was because, although PW7's main allegation was the rape, the acts of hugging and kissing were the acts that led to such rape. Hence, it was not reasonably possible to
F say that PW7's allegation regarding the hugging and kissing was true while her allegation regarding the sexual penetration was untrue. PW7 could not be unworthy of credit in one aspect of the case, but worthy in the other aspect of the same case. (paras 29-32)

G **(3)** The SJ had not given any cogent reasons as to why he had accepted PW7's allegations regarding the appellant's acts of hugging and kissing her but rejected her allegations on the appellant's rape. From the SJ's grounds of decision, it was clear that the SJ had not directed his mind or given any consideration or weight towards PW1's evidence and the serious contradictions between the same and PW7's evidence. These and
H the findings that (i) the falsity established on PW7's allegations of rape had given rise to reasonable doubt as to the truth of PW7's whole story, including PW7's allegations pertaining to the appellant's acts of hugging and kissing her; (ii) the SJ's findings and decision were purely based on PW7's demeanour, which was wrong and a misdirection; and (iii) if the
I SJ had carried out a maximum evaluation on all the evidence adduced, he would have found the prosecution had not made out a *prima facie* case against the accused, the appellant's appeal was allowed. The Sessions

Court's decision on conviction and sentence against the appellant was set aside. Whereas for the compensation paid to PW7, it was ordered to be returned or refunded to the appellant. (paras 34-36, 40-43 & 45)

Case(s) referred to:
Ab Malek Atan v. PP [2002] 6 CLJ 405 HC ***(refd)***
Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***
Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***
Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***
Kanbi Nanji Virji & Ors v. State Of Gujarat AIR [1970] SC 219 ***(refd)***
Khoo Cheng Huat v. PP [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Pie Chin v. PP [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 HC ***(refd)***
PP v. Bukarak Lingoi [1994] MLJU 506 ***(refd)***
Rex v. Low Toh Cheng [1941] MLJ 1 ***(refd)***
Tengku Mahmood v. PP [1974] 1 LNS 176 HC ***(refd)***

Legislation referred to:
Sexual Offences Against Children Act 2017, s. 14(a)

For the appellant - Farazwin Haxdy; M/s Farazwin Haxdy & Assocs
For the respondent - Rozanna Abd Hadi; DPP

Reported by Syamim Ariffin

JUDGMENT

Wong Siong Tung J:

[1] On 21 February 2020, the Sessions Court convicted the appellant of an offence under s. 14(a) of the Sexual Offences Against Children Act 2017 for the act of kissing the complainant (PW7) on the lips committed by the appellant on 11 February 2018 at around 11am.

[2] The complainant (PW7) was then around ten years and two months old. She was then a primary five school student.

[3] As punishment for the offence the appellant was found to have committed, the Sessions Court sentenced the accused to four years imprisonment with effect from the date of conviction with the period of remand from 27 June 2018 until 13 September 2018 to be taken into account and imposed one stroke of whipping upon the appellant. In addition, the Sessions Court also ordered the appellant to pay the complainant (PW7) as compensation, a sum of RM8,000 and in default five months imprisonment.

[4] By a notice of appeal dated 25 February 2020, the appellant appealed to this court against both decisions of the Sessions Court to convict the appellant and the sentence imposed.

[5] The Deputy Public Prosecutor also filed a notice of appeal dated 2 March 2020, in respect of decision of the Sessions Court on the sentence imposed upon the appellant and seeking to enhance the sentence by this court.

[6] The complainant's (PW7's) main complaints and accusations leading to the arrest and prosecution of the appellant were that the appellant (she also referred to as Abang Amin) and the other man (she referred to as Pakcik Farid) had raped upon her. See: exh. P7 at pp. 41 and 42 of the record of appeal, vol. 3.

[7] However, the appellant was not charged for rape of the complainant (PW7). Instead, the appellant was charged for only kissing the complainant (PW7) on her lips. The reasons are obvious in the grounds of the decision of the court after analysing the evidence of the complainant (PW7).

[8] The amended charge against the appellant is reproduced as follows:

> Bahawa kamu, pada sekitar 11 Februari 2018, jam lebih kurang 11.00 pagi, bertempat didalam sebuah bilik di dalam rumah di alamat SU2775, Kampung Jawa, 87000 WP Labuan di dalam Wilayah Persekutuan Labuan, telah melakukan amang seksual fizikal atas kanak-kanak dengan mencium bibir seorang kanak-kanak Aiza Binti Zakaria (No.MyKad: 071208-15-0058) berumur 10 tahun 2 bulan dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah Seksyen 14(a) Akta Kesalahan Seksual Terhadap Kanak-Kanak 2017 yang boleh dihukum dibawah Seksyen yang sama.

[9] The complainant (PW7) lodged a police report on 13 February 2018 (exh. P7 at pp. 41 to 42 of the record of appeal, vol. 3) in which she gave an account that the appellant not only kissed her on her lips, lifted her skirt, the appellant undressed himself and laid on top of her but also that the appellant inserted his penis into her genitalia. She alleged that, this happened on 11 February 2018 at 11am on the bed in the appellant's room at the appellant's family house.

[10] Not only that, by her police report, the complainant (PW7) also said that around July 2017, "selepas hari raya puasa", at kawasan hutan Kg. Jawa, a man the complainant (PW7) referred to as Pakcik Farid raped her "sebanyak sekali".

See: exh. P7 at p. 41 to 42 of the record of appeal, vol. 3.

[11] In the trial before the Sessions Court, the complainant (PW7) gave evidence again that not only the appellant hugged and kissed her on 11 February 2018 at 11pm but also went further to rape her.

[12] According to the evidence of PW5 (police inspector) who interviewed the complainant (PW7) child interview centre on 8 March 2018 following the police report lodged by the complainant (PW7), the complainant (PW7)

told her in the interview that on the day in question, the appellant hugged and kissed her on the accused's bed and then proceeded to rape her by penetrating her genitalia with that of his three times. This is as recorded in the transcripts of the interview produced as evidence in the trial. The complainant (PW7) said that she felt pain near her genitalia.

See: lines 214 to 250 of the transcript (exh. P6 (1-29)) at pp. 24 to 26 of record of appeal, vol. 3.

[13] The complainant (PW7) even said in the interview that, the appellant ejaculated in her while at the same time kissed her. She even described the colour of semen ejaculated by the appellant.

See: lines 253 to 265 of the transcript (exh. P6 (1-29)) at pp. 26 to 27 of record of appeal, vol. 3.

[14] She also gave account of how Farid raped her and the number of times of penetration. She said that she felt "sakit" after these incidences of rape allegedly committed by Farid upon her.

See: lines 24 to 56; 101 to 106; 290 to 331; and 437 to 442 of the transcripts (exh. P6 (1-29)) at pp. 13 to 15, 18, 28 to 31, and 38 of record of appeal, vol. 3.

[15] The complainant (PW7) also told PW5 in the interview that she had monthly period.

See: lines 363 to 369 of the transcript (exh. P6 (1-29)) at p. 34 of the record of appeal, vol. 3.

[16] The evidence of PW4 (the sister of complainant's mother, PW3) in the trial was that the complainant (PW7) told PW4 on 12 February 2018 that she was raped by Amin (the nickname of the appellant).

[17] According to PW4, the complainant (PW7) even spelt out to her, the word "r-o-g-o-l".

See: lines 1 to 9 of the NOP at p. 62 of the record of appeal, vol. 2A.

[18] The complainant (PW7) also told PW6 (investigating police officer) in the interview following the police report lodged by the complainant (PW7) that the appellant kissed her on her lips then raped her.

See: lines 6 to 18 of the NOP at p. 98 of the record of appeal, vol. 2A.

[19] The complainant (PW7) also told Doctor Fatimah bt Othman that she was raped by two suspects.

See: exh. P2(1-4) at p. 4 and 5 of the record of appeal, vol. 3.

[20] However, the evidence of the doctor (PW1) who conducted the medical examination of the complainant (PW7) after the complainant (PW7) lodged the police report was that the complainant (PW7) had not then even menarche, meaning in medical term, menstrual function had not begun.

[21] More importantly, the doctor's (PW1's) evidence has been that her examination of the genitalia showed that hers was normal. The complainant's (PW7's) hymen was intact, and urethral meatus, clitoris, posterior fourchette was normal.

See: exhs. P2(1-4) and P3 at pp. 4 to 8 of the record of appeal, vol. 3.

[22] Thus, the complainant's (PW7's) allegations that she was raped by the appellant and the other man cannot be true in the light of the medical evidence. It is wholly improbable that the complainant (PW7) had encountered any virginal penetration she alleged committed by the appellant.

[23] The complainant (PW7) displayed precocious awareness and knowledge of sexual intercourse between adult of opposite sexes from her description of the acts of "rogol" or rape to PW5 allegedly committed upon her which the medical evidence proved to be not true.

[24] How did the child of around ten years of age acquire such awareness and knowledge?

[25] The complainant (PW7) said that she had more than one Facebook account.

See: NOP at pp. 234 to 235 of the record of appeal, vol. 2A

[26] It is probable that the complainant (PW7) has been an internet user. Given the exposure of the children nowadays to pornographic websites which are so prevalent and easy accessibility to these internet websites by children through the use of handphones or computers, her precocious knowledge and imagination of these sexual matters are not surprising and not improbable.

[27] The medical evidence of the doctor (PW1) destroyed the credibility of the allegations of the complainant (PW7) in respect of incidences including the acts of the appellant hugging and kissing her and leading to the rape or sexual assault she alleged that the appellant had committed upon her.

[28] There is no evidence adduced to explain the serious contradictions between the evidence of the doctor (PW1) of the intact hymen of the complainant (PW7) and the complainant's (PW7's) story that the appellant and the other man had committed the sexual penetration upon her.

[29] The allegations of the complainant (PW7) that the appellant had hugged and kissed her on her lips were acts leading or incidental to the act of the appellant raping her. The rape was the complainant's (PW7's) main allegation and complaint.

[30] The alleged acts of hugging, kissing and rape or sexual penetration are inextricably intertwined.

[31] It is not reasonably possible to say that the complainant (PW7) was telling the truth in respect of her allegations that the appellant hugged and kissed her while her allegations that the appellant had sexually penetrated or raped her were proved to be untrue as established by evidence of the doctor (PW1).

[32] The complainant (PW7) cannot to be unworthy of credit in one aspect of the case, that is in respect of her allegations that the appellant sexually penetrated her or raped her and worthy of credit in another aspect, that is the appellant had hugged and kissed her in the same criminal transaction.

[33] In *Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ 150, Spencer-Wilkinson J stated at p. 153 that:

> … Once the evidence of a witness has been rendered unworthy of credit by reason of his complicity in one offence then his credit has gone for all purposes in that trial. A witness cannot be regarded as a split personality who is worthy of credit at one moment and unworthy of credit at the next. …

See: *Kanbi Nanji Virji & Ors v. State Of Gujarat* AIR [1970] SC 219; *Khoo Cheng Huat v. PP* [1990] 2 CLJ 790; [1990] 2 CLJ (Rep) 236; [1991] 1 MLJ 42 at p. 86, per Edgar Joseph Jr J and *Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ 150 at p. 153 *PP v. Bukarak Lingoi* [1994] MLJU 506; *Pie Chin v. PP* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703; [1985] 1 MLJ 234 at 235 and *Ab Malek Atan v. PP* [2002] 6 CLJ 405; [2002] 4 MLJ 84.

[34] The falsity established of complainant's (PW7's) allegations that the appellant had raped her raised not only reasonable doubt but a serious one to the truth of the whole story of the complainant (PW7) including the allegation that the appellant had also hugged and kissed her prior to the rape she alleged.

[35] The learned Sessions Court Judge did not give any cogent reasons why he accepted the complainant's (PW7's) allegations and evidence that the appellant did hug and kiss her in the light of the falsity of the complainant's (PW7's) allegations and her evidence that she was raped by the appellant as established by the medical evidence of PW1.

[36] From the written grounds of decision of the learned Sessions Court Judge, it seems that the learned Sessions Court Judge had not directed his mind and gave any consideration and any weight to the evidence of the doctor at all who carried out the medical examination of the complainant (PW7).

[37] Thus, the learned Sessions Court Judge had not directed his mind at all and considered the seriousness of the contradictions of the allegations in the story told by the complainant (PW7) that the appellant and the other man had raped her and the intact hymen of the complainant (PW7) as found by PW1 in her examination of the complainant (PW7).

[38] The learned Sessions Court had not therefore directed his mind and considered the probability of untruth told by the complainant (PW7) of other obnoxious acts (kissing on the complainant's (PW4's) lips) she alleged performed by the appellant upon her for which the appellant was charged.

[39] There was simply no evaluation or if there was, no proper evaluation of the evidence and appraisal of all the evidence of all the witnesses in the trial by the learned Sessions Court Judge as he said he had considered otherwise, he would have addressed the inconsistencies or contradictions.

See: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19; [2003] 2 MLJ 97; *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153; [1997] 3 MLJ 61; and *Rex v. Low Toh Cheng* [1941] 1 MLJ 1.

[40] In my judgment, it is unsafe to accept as truth the complainant's (PW7's) story that the accused had kissed her, an act the complainant (PW7) said leading to the rape allegedly committed by the appellant upon her which is her main complaint and accusation and which cannot be true based on the independent evidence of the doctor (PW1) and the medical examination report (exhs. P2(1-4) and P3).

[41] It seems that the findings of the learned Sessions Court Judge leading to the conviction of the appellant was purely based on demeanour of the complainant (PW7). This is wrong and is a misdirection.

See: *Tengku Mahmood v. PP* [1974] 1 LNS 176; [1974] 1 MLJ 110 and *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40; [1984] 2 MLJ 165, (PC).

[42] If the learned Sessions Court Judge had carried out maximum evaluation of the evidence of all the witnesses called by the prosecution at the close of the prosecution case as the learned Sessions Court Judge professed in the grounds of his decision, particularly the evidence of the doctor (PW1) called, the learned Sessions Court Judge would probably find that the prosecution had not made out a *prima facie* case of the charge as proffered upon the accused.

[43] I therefore allowed the appellant's appeal and set aside the conviction and sentence imposed upon the appellant by the learned Sessions Court Judge.

[44] Accordingly, I also dismiss the appeal of the prosecution against the sentence.

[45] I direct that the sum paid as compensation, if any, by the appellant to the complainant (PW7) be returned or refunded to the appellant.